Submission on behalf of the descendants of Waanyi ancestor Minnie (*Mayabuganji*) to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, in relation to the *Native Title Amendment Bill 2012*

Whether a sensible balance has been struck in the Bill between the views of various stakeholders

1. This part of the submission addresses certain proposed amendments to the Indigenous Land Use Agreement provisions of the *Native Title Act 1993* ("NTA") which are contained in Schedule 3 of the exposure draft of the *Native Title Amendment Bill 2012*, being those proposed amendments intended "*to streamline registration and authorisation processes for ILUAs*"[1] It is submitted that the proposed amendments do not strike a sensible balance between individuals or groups seeking to oppose registration of an ILUA on the grounds of inadequate authorisation processes and the interests of other stakeholders, but are inappropriately stacked against the interests of the former.

2. The effect of the relevant proposals being enacted would be the following:

   (a) There would be no longer be any ability for individuals to object to the registration of an ILUA which has been certified by the relevant native title representative body ("ntrb");

   (b) The ability of a competing group of putative native title holders to prevent registration of an ILUA by lodging their own application for a determination of native title would be narrowed from four months[2] to one single month; and

   (c) The window for an objection to be made to the registration of an uncertified ILUA would be reduced from three months from the notification date for the ILUA to one month.

3. The cumulative effect of the first two of these changes is to put an ntrb's decision to certify an ILUA beyond challenge by traditional owners. A provision requiring a competing group of putative traditional owners to have a claim registered within one month from notification could simply not be enacted in good faith, as it is wholly unreasonable to expect even a properly-resourced claimant group to prepare and lodge a registrable claim and supporting evidence (being evidence which would ordinarily include evidence of the claim having been authorised by a meeting of the native title claim group for which adequate advance notice had been given) within the deadline of **approximately two weeks from notification** which would effectively apply, in order for there to be any reasonable expectation of the Native Title Tribunal being able to apply the registration test to the application, before the one-month notification period had elapsed.[3]

[1] Outline to the Explanatory Memorandum.

[2] Being three months from the notification date for the relevant ILUA plus a further month in which to have the claim registered.

[3] It is noted in this regard that neither the NTA in its present form, or the proposed amendments, place any requirement on the Register or her delegates to use their best endeavours to apply the registration test to an application lodged in response to a notified ILUA, equivalent to the requirement which applies to the registration-testing of an application lodged in response to a "future act" notice.

It is submitted that it would not be reasonable to expect most traditional owners to have the resources to bring ADJR proceedings against the relevant ntrb and/or the Registrar. However, if it was to be assumed that most traditional owners would have reasonable accesses to those resources, requiring them to bring ADJR proceedings in order to oppose the registration of an ILUA would do nothing to "streamline" the ILUA process.

4. The inappropriateness of placing an ntrb's certification of an ILUA beyond effective challenge is illustrated by the experience of the descendants of Waanyi ancestors Minnie (*Mayabuganji*), which are discussed below.

5. Finally, it is submitted that in the case of an ILUA which has not been certified by an ntrb, a period of one month from notification is an inadequate period for the preparation and lodging of an objection, even where the objector was being assisted by the relevant ntrb.

Proposals for future reform of the Native Title process

6. The proposals for future reform made in these submissions need to be considered against the background of the experience which the descendants of Waanyi ancestor Minnie (*Mayabuganji*) have had, in the course of their efforts to obtain legal recognition as members of the Waanyi people.

7. The lady known as Minnie (*Mayabuganji*) was the subject of the Federal Court's decision in *Aplin v Queensland* [2010] FCA 625 ("*Aplin*").

8. Dowsett J made findings regarding Minnie in *Aplin* at [250] to [251] which included the following:
   - during her life, Minnie identified herself as a Waanyi woman and asserted such affiliation;
   - such self-identification was based on her belief that she had at least one Waanyi parent;
   - From 1888 until at least 1939, Minnie was recognized by the Waanyi people at Lawn Hill as a Waanyi woman; and
   - From about 1916 until her death in 1943, Minnie was recognized by the Waanyi people at Burketown as a Waanyi woman.

   Context for these findings are provided elsewhere in his Honour's reasons.

9. The reference to a mere "belief" by Minnie that she had at least one Waanyi parent needs to be considered in the context of the following observation at [125]:

   "*It is convenient …to reflect upon the extent to which a person can know with certainty the identity of his or her mother or father. I am inclined to the view that in*

the absence of modern scientific evidence, it is impossible for a person to know such matters as facts. Having an opinion or belief about them is a different matter. To my mind, when one purports to identify oneself as the offspring of particular parents, one is generally stating an opinion or belief based on experience and the views of others, not stating proven biological facts. If Minnie said that she was Waanyi, then she was saying something about her understanding of her parentage. If other members of the community in which she lived said that she was Waanyi, they were also stating opinions. A mother is the only person who can know the identity of her child's parents with any degree of certainty. Another person, knowing the circumstances of a child's birth, may know the child's mother but, generally, not with certainty, his or her father. Opinion and belief may be based on knowledge, but are not, themselves, knowledge."

10. Dowsett J did not consider that the evidence in the proceeding supported findings that Minnie had been recognised as Waanyi by other Waanyi people at other places. However, the following passage of his Honour's decision at [243] is clearly relevant, for the purpose of considering the weight that should be given to his findings that Minnie had been recognised as being Waanyi at both Lawn Hill and Burketown:

"[A] *factor which must be kept in mind is the so-called Diaspora of the Aboriginal peoples. Although the Waanyi people may not have been as adversely affected as their neighbours by the violence which marked the latter years of the 19th and early 20th centuries, they were nonetheless dispersed, as Professor Trigger reveals in his identification of the various Waanyi population centres. Again, I must keep in mind the conditions of the time and, in particular, the absence of easy communication between geographical areas. It is, for example, possible that a family might have been recognized at Lawn Hill or in Burketown as being Waanyi, but not at Doomadgee or Borroloola, simply because the relevant information had not travelled to those locations. No doubt there has always been movement to and from those locations, but that would not guarantee that all knowledge was shared. There were also people, such as Mr Hookey, who left Waanyi country to work elsewhere, taking his knowledge and memories with him."*

11. Dowsett J himself made the significance of his *Aplin* findings clear, in the following exchange on 12 October 2010[4] between his Honour and counsel for the Waanyi applicant:

HIS HONOUR: …The question is, does the claim group actually think that recognition in the 1930s and 1940s at Lawn Hill, in the heart of Waanyi country, and at Burketown, outside Waanyi country, but a place where there is a concentration of Waanyi population, means nothing. That's what it boils down to, and nobody has any other direct knowledge of her. And there is the third person, who was also, as I

[4] T.12.10.10, p.30:40 to p.31:28.

understand it, an influential person who – what's his name? Is it Palmer or – the man who Mr Phillips actually spoke to in Mount Isa.

MS BOWSKILL: Peterson, Mr Peterson.

HIS HONOUR: Peterson, Mr Peterson, yes, Mr Peterson. I understand he is a very influential person and he said the same thing. Now, people talk about respect for elders, but when the elders say something they [don't?] like, nobody listens to them apparently.

MS BOWSKILL: Your Honour, that point of view, in my submission, goes beyond what your Honour has said in paragraph 267 of the reasons.

HIS HONOUR: That's right, and that's appropriate, isn't it? I mean, I am – what I am doing now is suggesting to lawyers what lawyers should be saying about what I have said, from a practical forensic point of view.

MS BOWSKILL: Well, your Honour, with respect it would not be considered appropriate for the lawyer for the claim group to say to them, "You must decide to accept a person because of these findings."

HIS HONOUR: I'm not saying you should say you must decide, what I'm saying is you should say, "It's a matter for you, but these are the factors you've got to take into account, and in my view they point in one direction," if they do, and I can't see why they wouldn't.

12. Dowsett J made clear in *Aplin* at [269] that the members of the claim group as presently constituted were bound by his findings, and made the following suggestion as to how the matter should be progressed:

"*I suggest that those advising the members of the claim group encourage them to seek the considered views of a small committee, perhaps made up of those who presently constitute the applicant. The task would be to examine the evidence in the light of my findings (by which they will be bound) and subject to such legal or other advice as they may deem appropriate. The committee should be asked to formulate a recommendation for adoption by a subsequent meeting of the claim group. I suggest that careful consideration be given to the recorded views of Mr Hookey, Mr Seccin and Mr Peterson and the likely bases of those views. Such views should not be dismissed out of hand merely because they do not comply with preconceived notions concerning the Minnie family.*"

13. A subcommittee comprising members of the Waanyi applicant did indeed meet to address the issue on the afternoon of 31 August 2010. However, it declined to formulate any recommendation which could be put to the wider claim group.

14. The failure of this subcommittee to make a recommendation for adoption by the full claim group **completely defeated the rationale for its existence**, as explained by Dowsett J in *Aplin*, earlier in [269]:

> "*To my mind a meeting of the claim group is unlikely to give the necessary* **measured consideration** *to the question in order to arrive at an* **informed and fair decision**. *The politics of the situation are likely to confuse and distort views of the evidence which must be considered in order to make that decision*." (emphasis added)

15. A claim group meeting facilitated by the relevant ntrb, the Carpentaria Land Council Aboriginal Corporation ("CLCAC"), proceeded to discuss the issue on 1 and 2 September 2010. At that meeting, claim group members who were opposed to the recognition of Minnie's descendants as Waanyi (presumably for political/personal reasons) filibustered the topic, raising matters which had already been comprehensively resolved by the decision in *Aplin*,[5] or that were irrelevant to the issue at hand. The CLCAC took no steps to ensure that the meeting received independent advice regarding the effect of the decision in *Aplin*, but instead entrusted that task to the same lawyers who had been responsible for fighting against Minnie's descendants, in the court case which led to the decision.

16. The meeting concluded with the following resolution being passed:

> *"The issue of whether Minnie was Waanyi will not be made by vote at a meeting today. This is a matter which will continue to be discussed in a traditional way.*"[6]

Despite ***two and a half years*** now having elapsed since that resolution was passed, there is no evidence of either the Waanyi PBC or the CLCAC having taken any steps to progress or revisit the making of a decision regarding recognition of Minnie; rather, it appears that all relevant parties – aside from Minnie's descendants themselves – are perfectly content for the issue to be left permanently unresolved, with the consequence

[5] That Minnie had not been identified as a Waanyi ancestor in the course of genealogical research carried out by Professor David Trigger and others over more than ten years (CF *Aplin* at [54] to [55] and [79]), and that there were several Minnies, and the group can't know for sure which one is being talked about (CF *Aplin* at [79]: "[T]*he clear references to Minnie, her second husband and daughter Sarah convince me that Mr Seccin was speaking of Minnie,* **the person who is the focus of the present inquiry**."(emphasis added)).

[6] Letter from Chalk & Fitzgerald to Blackshield Lawyers dated 9 September 2010.

that her descendants will be permanently excluded from the benefits flowing to the determined Waanyi native title holders under the NTA.[7]

17. It is in the context of this history that the following proposals for reform are put forward.

18. Firstly, it is proposed that amendments be introduced to require all issues raised by indigenous persons who have applied to be joined as parties to an application prior to the closing of the notification period, to be addressed and resolved prior to mediation occurring between the applicant and the relevant State or Territory, or with any non-indigenous third parties.

19. Secondly, it is proposed that the NTA be amended so as to give the Commonwealth Administrative Appeals Tribunal jurisdiction over all decisions made by ntrbs in the exercise of their functions under the NTA, so that affected parties could apply to that Tribunal to have such decisions reviewed on their merits. The existing mechanism under the NTA for review of ntrb decisions contained in sections 203FB to 203FBB of the NTA is ineffective and unsatisfactory, for the following reasons:

    (a) the existing process only applies to decisions made by an ntrb pursuant to its section 203BB facilitation and assistance functions to not assist the complainant;

    (b) the process may take an inordinate length of time, as ss.203FBA(4) and 203FBB(4) effectively require complainants to exhaust all avenues for obtaining an internal review by the ntrb of its own decision, before it can be addressed by an External Reviewer or by FaHCSIA's Secretary; and

    (c) the provisions place the power to determine requests for review in the hands of Commonwealth bureaucrats who are even less accountable than the officers or boards of the ntrbs whose decisions are being impugned.

20. Thirdly, section 203BF of the NTA should be amended so as to make clear that the dispute resolution function of ntrbs extend to disputes between individuals, or between individuals and PBCs, relating to the status of any particular individual or groups of persons as members of a **determined** class of native title holders. Such disputes will deal with matters which will fall squarely outside the expertise of the Office of the Registrar of Indigenous Corporations.

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[7] Schedule 5 of the Waanyi determination made by Dowsett J (see *Aplin on behalf of the Waanyi Peoples v State of Queensland (No 3)* [2010] FCA 1515) states that:

> "A person is a Waanyi person if and only if:
>
> 1. the other Waanyi people recognise that he or she is descended (which may include by adoption) from a person who they recognise as having been Waanyi; and
>
> 2. the person identifies himself or herself as a Waanyi person. ..",

and goes on to provide a **non-exhaustive** list of presently-recognised Waanyi ancestors.